Bagusia Sdn Bhd v Malaysia Assurance Alliance Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–302 OF 1997
ABDUL WAHAB J
11 JANUARY 2005

Shipping and Navigation — Marine insurance — Perils of sea — Piling boom detached from bracket while towed by tug boat — Whether damage caused by perils of sea

Shipping and Navigation — Marine insurance — Issue of cover note — Whether insurer could unilaterally issue new cover note with change of terms after issue of first cover note

A barge's piling boom belonging to the plaintiff ('Bagusia PB 2') was totally detached off its bracket and fell into the sea while being towed by a tug boat from Japan to Malaysia. The plaintiff claimed RM1,760,000 from the defendant, the full amount that the barge was insured for. The defendant failed to pay the amount claimed and plaintiff brought this action. The defendant in its defence said that the plaintiff was not covered because the piling boom was detached off its bracket and the barge was damage as a result of it. It was not caused by perils of the sea since the sea at that time was calm. Furthermore, the plaintiff, by allowing the survey to be done by a Japanese company, was said to have breached the warranty in the insurance contract. The contract stipulated that the survey was to be done by the London Survey Association ('LSA').

The issues were, which of the two cover notes — CN 541 or CN 542 — applied to the voyage in question. The evidence showed that the defendant had firstly issued CN 541 on 31 October 1995 in Johor Bharu in favour of the plaintiff. Due to certain errors on the details of the piling barge in CN 541, the defendant subsequently issued the new cover note CN 542 and unilaterally imposed new conditions and warranties, specifically on the issue of LSA surveyors or approved surveyor. The plaintiff urged the court to decide that cover note CN 541 was the applicable cover note, and moved the court to rectify CN 541 with regards the errors in the details of the piling barge.

Held, allowing the plaintiff's rectification and claim with costs:

(1) The court found that the plaintiff had proven its case on the balance of probabilities. The court accepted PW3's evidence that the wind force of 6 on the Beaufort scale means that the wind was strong and coupled with rough seas and bad weather. This meant that the damage suffered by the piling barge was a result of perils of the sea (see para 35).

(2) As for which cover note was in force, it was clear from the evidence that the plaintiff never intended for a new cover note CN 542 to be issued. When it faxed the letter to the defendant on 2 November 1995, it wanted the defendant to rectify the errors regarding the details of the piling

barge in CN 541. However, the defendant unilaterally issued a new cover note in the form of CN 542 instead. The plaintiff never requested for issuance of a new cover note (see para 36). Thus, CN 541 was the cover note that was in force at the material time. Premium was paid for it. No premium was paid for CN 542. Nevertheless the defendant issued CN 542. It was evident that the defendant had not issued any prior notice on this change. Notice was crucial since CN 542 contains the clause that survey must be done by LAS surveyors. This, coupled with the absence of underwriters or reinsurers on the part of the defendant to give evidence on this, reinforced by belief that the defendant was seeking to merely escape liability (see para 37).

(3) Both parties had concluded a contract for insurance in CN 541. Both parties had the same common intention, which was to insure the piling barge purchased by the plaintiff, Bagusia PB 2. The rectification sought for by plaintiff was minor as it only involved the amendment of particulars and description of the piling barge in CN 541. The rectification was allowed (see para 39).

[**Bahasa Malaysia summary**

Tiang joran baj milik plaintif ('Bagusia PB 2') terlepas daripada pendakapnya dan jatuh ke dalam laut semasa dibawa oleh bot tunda daripada Jepun ke Malaysia. Plaintif menuntut RM1,760,000 daripada defendan, jumlah keseluruhan yang diinsuranskan ke atas baj tersebut. Defendan telah gagal membayar jumlah yang dituntut dan plaintif telah memulakan tindakan ini. Defendan dalam pembelaannya menyatakan bahawa plaintif tidak dilindungi kerana tiang joran tersebut terlepas daripada pendakapnya dan baj itu rosak akibat daripadanya. Ia bukan disebabkan oleh bahaya laut kerana keadaan laut pada masa itu tenang. Tambahan pula, plaintif, dengan membenarkan kerja-kerja pengukuran dilakukan oleh syarikat Jepun, dikatakan telah melanggar waranti dalam kontrak insurans tersebut. Kontrak tersebut menetapkan bahawa kerja-kerja mengukur hendaklah dilakukan Persatuan Juruukur London ('PJL').

Persoalannya adalah, nota muka mana — CN 541 atau CN 542 — yang terpakai untuk pelayaran yang dipersoalkan. Keterangan menunjukkan bahawa defendan telah pada mulanya mengeluarkan CN 541 pada 31 Oktober 1995 di Johor Bharu bagi pihak plaintif. Akibat daripada kesilapan tertentu berhubung butiran tentang tiang baj dalam CN 541, defendan kemudiannya mengeluarkan nota muka baru CN 542 dan secara satu pihak (unilateral) mengenakan syarat-syarat dan waranti-waranti baru, secara khususnya berhubung isu juruukur atau juruukur yang diluluskan oleh PJL. Plaintif memohon mahkamah untuk memutuskan yang nota muka CN 541 adalah nota muka yang terpakai, dan menggesa mahkamah untuk memperbetulkan CN 541 berkaitan kesilapan dalam butiran tiang baj itu.

Diputuskan, membenarkan pembetulan dan tuntutan plaintif dengan kos:

(1) Mahkamah mendapati bahawa plaintif telah membuktikan kesnya di atas imbangan kebarangkalian. Mahkamah menerima keterangan PW3 bahawa kuasa angin 6 pada skala Beaufort bermaksud angin kuat dan juga laut yang bergelora dan cuaca buruk. Ini bermakna kerosakan yang dialami oleh tiang baj adalah akibat bahaya laut (lihat perenggan 35).

(2) Berhubung nota muka mana yang berkuat kuasa, ia adalah jelas dari keterangan bahawa plaintif tidak berniat untuk mengeluarkan nota muka baru CN 542. Semasa memfakskan surat kepada defendan pada 2 November 1995, ia inginkan defendan membetulkan kesilapan berkaitan butiran tiang baj dalam CN 541. Namun begitu, defendan secara unilateral telah mengeluarkan nota muka baru dalam bentuk CN 542. Plaintif tidak pernah memohon untuk pengeluaran nota muka baru tersebut (lihat perenggan 36). Oleh itu, CN 541 adalah nota muka yang berkuat kuasa pada masa matan. Premium telah dibayar untuknya. Tiada premium dibayar untuk CN 542. Namun demikian defendan telah mengeluarkan CN 542. Adalah nyata bahawa defendan tidak mengeluarkan apa-apa notis sebelum penukaran tersebut. Notis adalah penting kerana CN 542 mengandungi fasal yang mana kaji selidik hendaklah dilakukan oleh pengkaji selidik LAS. Ini, dan juga ketiadaan penaja jamin atau penginsurans semula di pihak defendan untuk memberikan keterangan tentang perkara ini, menguatkan lagi kepercayaan bahawa defendan hanya ingin melepaskan diri daripada liabiliti (lihat perenggan 37).

(3) Kedua-dua pihak telah memasuki satu kontrak untuk insurans dalam CN 541. Kedua-dua pihak mempunyai niat sama, iaitu menginsuranskan tiang baj yang dibeli oleh plaintif, Bagusia PB 2. Pembetulan yang dipohon oleh plaintif sedikit sahaja kerana hanya melibatkan pindaan kepada butiran dan gambaran tiang baj dalam CN 541. Pembetulan tersebut dibenarkan (lihat perenggan 39).]

Notes

For cases on marine insurance generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1442–1483.

Cases referred to

'Benoi VI', The [1987] 2 MLJ 123 (refd)
Mat Roni bin Daud v Siti bte Hussin & Ors [2000] 5 MLJ 605 (refd)
Pang Lim v China Insurance Co Ltd [1975] 1 MLJ 239 (refd)
Rivertake Properties Ltd v Paul [1974] 2 All ER 656 (refd)
Southwind Development Sdn Bhd v Hass Plantation Sdn Bhd [1996] 5 MLJ 85 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Specific Relief Act 1950 ss 30, 31

Felix Raj (Anad & Noraini) for the plaintiff.
Andrew Khoo (Khoo & Sidhu) for the defendant.

Abdul Wahab J:

[1] This case involves an insurance claim that arose out of an accident involving a barge in its journey from Japan to Malaysia. The barge, 'Bagusia PB 2' belongs to the plaintiff. The barge's piling boom was totally detached off its bracket and fell into the sea while being towed by a Japanese tug boat from Japan to Malaysia.

[2] Since the boat was among others, insured from perils of the sea, the plaintiff claimed RM1,760,000 from the defendant, the full amount that the barge is insured for. The defendant failed to pay the amount claimed and plaintiff brought this action.

[3] The defendant in its defence said that the plaintiff is not covered because the piling boom was detached off its bracket and the barge was damage as a result of it. It was not caused by perils of the sea since the sea at that time was calm. Furthermore, the plaintiff, by allowing the survey to be done by a Japanese company, was said to have breached the warranty in the insurance contract. The contract stipulated that the survey was to be done by the London Survey Association ('LSA').

[4] The case was heard before Abdul Hamid bin Haji Mohamad J (as he then was). The plaintiff's first witness gave evidence on 24 January 2000 and 28 to 29 January 2000. The defendant's counsel had not cross-examined him yet. When the case came up for hearing before me, the parties had narrowed down the issues to two. The issues are, which cover note applies to the voyage in question. Is it cover note G96–000541 dated 31 October 1995 ('CN 541') or cover note G96–000552 dated 14 November 1995 ('CN 542')? It was the plaintiff's case that if the court decided that CN 541 is the applicable cover note, then the court would have to consider if the plaintiff is entitled to rectification of CN 541 as pleaded in the amended statement of claim.

[5] Pursuant to the statement of agreed facts in encl F, parties had agreed that CN 541 was issued by the defendant in Johor Bahru in favour of the plaintiff and that the plaintiff had paid a premium of RM114,830 to the defendant concerning CN 541.

[6] The defendant issued CN 541 on 31 October 1995 in Johor Bharu in favour of the plaintiff. The plaintiff paid a premium of RM114,830 for CN 541 but no receipt was issued. The plaintiff said that it had not made any payments

for CN 542. Despite this, and the fact that it has issued a debit note only for CN 541, the defendant went ahead and issued CN 542. The plaintiff claimed that by this act, the defendant seemed to be trying to escape liability. It used the plaintiff's payment to issue the receipt, as if CN 541 was not issued.

[7] PW1 said in his evidence that the plaintiff only purchased one piling barge from Japan. It was then known as 'Gonzaisho Go No 8'. The name of the barge was subsequently changed to 'Bagusia PB 2'. Showa Leasing (M) Sdn Bhd financed the purchase of the barge. Apart from the barge, the plaintiff did not purchase any other vessel, such as a tug boat.

[8] According to PW1, Showa Leasing (M) Sdn Bhd's representative, where matters regarding the plaintiff and defendant are concerned, Mr Alfred Chen ('PW2') was the principal contact person in Showa Leasing (M) Sdn Bhd. Showa Leasing (M) Sdn Bhd had recommended that the plaintiff obtain policy coverage from the defendant for the piling barge. PW2 said that exh P–12, containing the correct details of the piling barge Bagusia PB 2 was given to the defendant, in order for the defendant to issue CN 541. Bagusia PB 2 was insured with the defendant under CN 541 from 31 October 1995 to 30 October 1996. PW1 confirmed that the insured sum of Bagusia PB 2 was RM1,760,000. CN 541, among others was issued to cover the delivery voyage of the piling barge from the Port of Yokkaichi in Japan to Tanjong Manis, Sarawak.

[9] PW1 gave evidence that the piling barge was purchased from Mazuda International Inc of Japan, at the price of approximately RM1.36 million. Full payment was made for the piling barge. It was to be employed at a project in Tanjong Manis, Sarawak and was to be transported by tug boat towing from Japan.

[10] As for insurance cover, both PW1 and PW2 confirmed that CN 541 was issued to cover the piling barge Bagusia PB2. According to PW1, the payment of the premium of RM114,830 was towards CN 541 only as the defendant issued one debit note only and that is concerning CN 541. Learned counsel for the plaintiff highlighted that DW1 in his cross-examination had admitted that the plaintiff never received a debit note for CN 542.

[11] In PW1's evidence he said that details of the piling barge in CN 541 was incorrect and that he had issued a fax on 2 November 1995 to amend the portion on the details of the vessel. The fax had expressly stated that the other conditions are to remain unchanged. PW1, PW2 and DW1, in cross-examination gave evidence that the defendant received the fax for the amendment of details of the barge in CN 541 on 2 November 1995.

[12] As for CN 542, PW1 said that he only saw CN 542 in the morning when he came to work on 2 November 1995. The piling barge began towing on the very same day at 6.50am. The towing was undertaken by an approved surveyor as required under CN 541. Meanwhile, PW1 and DW1 under cross-

examination agreed that the plaintiff had only meant to amend CN 541. The plaintiff had never requested for a new cover note.

[13] DW1 in his cross-examination agreed that the plaintiff only requested insurance cover for only one piling barge. The repudiation of the claim was done only with reference to CN 542. DW1 further agreed that the defendant had imposed new conditions and warranties in CN 542, albeit unilaterally. This includes removing the reference to 'approved surveyor' that is found in CN 541. Under cross-examination, DW1 agreed that at any material time the defendant did not issue any notice to the plaintiff canceling CN 541. DW1 said he was not sure whether P–12 was given to the defendant before CN 541 was issued. However, he agreed that these were the details of the piling barge sent to the defendant for insurance purposes. DW1 said that he has no experience issuing cover notes for marine vessels. Bagusia PB 2 was the first piling barge that he has ever insured.

[14] Referring to encls 'G' and 'H', DW1 agreed in cross-examination that they are photographs of a piling barge and that the distinctive feature of a piling barge is the mast and tower. Under cross-examination, DW1 agreed that the remarks 'piling barge' on exh D–51(a) was done by one Ms Yap, an employee of the defendant. She was not called to give evidence for the defendant. On being shown the diagram of the piling barge at p 25 of P–12, he agreed that it is the same as that appearing in D–51(c).

[15] PW3, Captain CL Malunda, a master mariner confirmed the contents of P–23 and P–24. PW3, referring to p 46 of P–24 stated that in this case, the wind force of 6 on the Beaufort scale means that the wind is strong and coupled with rough seas and bad weather. The damage suffered by the piling barge was a result of perils of the sea. According to PW1, the total costs of the repairs to the piling barge was RM2,172,286,28.

[16] In the evidence of PW1, PW2 and DW1, it was said that the plaintiff did attend and meet the plaintiff's representative on a number of occasions to resolve the matter after the defendant issued the repudiation of the claim. The plaintiff has thereafter kept the defendant informed of all the action that it took to repair the piling barge. The plaintiff sent a letter dated 4 November 1996 ('P–14') denying the repudiation and rejecting the defendant's *ex-gratia* offer of RM100,000. The plaintiff took this step when it felt that the defendant was not keen in resolving the plaintiff's claim.

[17] Learned counsel for the plaintiff submitted that the defendant's sole witness gave brief evidence that did not challenge the plaintiff's evidence or documents. According to learned counsel, the defendant only called one witness when there are more relevant and material witnesses. One class of such witnesses are the underwriters/re-insurers who determined the premium amount of RM114,830. Their attendance was necessary as according to DW1's evidence the premium was determined by them and not by the defendant. There are

clear differences in the specification of the vessel described in CN 541 and CN 542. Therefore it is highly likely that the premium amount would have also changed. As a result the premium for CN 542 is unlikely to be RM114,830. The evidence of underwriters/re-insurers would also be material because it would shed some light on how CN 541 and CN 542 was issued and what happened after the plaintiff sent its fax to rectify certain errors in CN 541.

[18] According the plaintiff's learned counsel, the defendant's employee, Ms Yap is also a material witness because she was the only person who wrote the words 'piling barge' on exh D–51(a). Learned counsel claimed that it is most probably the key reason why the wrong details of the piling barge was stated in CN 541. Learned counsel submitted that Ms Yap's evidence is vital because DW1 has said that D–51(a) was one of the documents that was used to when issuing CN 541. Since Ms Yap wrote the remark 'piling barge', her evidence is material to explain how she could make such remarks when in fact exh D–51(a) was not the details of the piling barge Bagusia PB 2 but that of a tug boat.

[19] Also a material witness according to the plaintiff's learned counsel are the personnel involved in issuing the debit note ('P–10') and the receipt ('P–11'). They could give evidence as to how a receipt was issued for CN 542 when no payment was made for it and why no debit note was issued for CN 542. They could also show how the defendant re-directed payment for CN 541 to CN 542. On the defendant's failure to lead evidence on this, counsel for the plaintiff cited the *contra preferentum* rule.

[20] Another material witness according to plaintiff's learned counsel is the author of the report by Salvage Association dated 27 November 1995. This document is relevant to the plaintiff's allegation that the defendant is not liable for the plaintiff's claim.

[21] PW3, according the plaintiff's learned counsel, had given material evidence on 'perils of the sea'. Therefore the defendant is also expected to bring its witnesses on the issue. The plaintiff urged the court to treat the evidence of PW3 as that of an expert. PW3 had given evidence that he is a master mariner and amply qualified to give evidence on perils of the sea.

[22] The plaintiff's learned counsel raised adverse inference under s 114(g) of the Evidence Act for the defendant's failure to call the above witnesses.

[23] DW1, according to the plaintiff's learned counsel, cannot be relied on. This is because he gave contradictory evidence during his evidence-in-chief and cross-examination, sometimes referring to the subject matter as a piling barge, at one time a vessel and the other, as a boat. It is not clear as to how the defendant obtained the details of the vessel before issuing CN 541. Learned counsel said that a general comparison of the 'vessel' described in exh D–51 with P–9 (CN 541) would show that the details therein are not similar and in fact a visual inspection would show that they are not the same vessels. The

defendant had alleged that the plaintiff or Showa Leasing (M) Sdn Bhd gave the wrong details. Therefore according to the plaintiff's learned counsel, the onus of proof lies on the defendant.

[24] Learned counsel submitted that the defendant at the very onset was aware of what were the correct details of the piling barge before CN 541 was issued. However, the defendant erroneously stated the wrong details of the piling barge in CN 541. It was said to be most probably as a result of the actions of Ms Yap in making the remarks 'piling barge' on D–51. It was further submitted that the since the defendant is to be blamed for entering the wrong details of the piling barge in CN 541, the plaintiff is entitled to request for a rectification of CN 541 as pleaded in the amended statement of claim.

[25] The plaintiff alleged that the defendant may have attempted to cover up the above mistake by issuing a cover note CN 542 despite there being no premium payment for CN 542. By choosing to issue a new cover note over amending CN 541, the defendant could change the terms and conditions unilaterally, specifically on the issue of LSA surveyor or approved surveyor. This is significant as the defendant's repudiation letter shows that defendant's principal or probably sole ground for denying liability is failure of the plaintiff to appoint an LSA Surveyor as required by CN 542.

[26] The plaintiff's learned counsel reiterated that CN 542 could never apply as the defendant had issued a debit note only for CN 541 and not for CN 542. Premium was paid for CN 541 but none for CN 542. Therefore it was submitted that CN 541 applies and the plaintiff has complied with all its requirements. The pre-tow survey was done by an approved surveyor and the damage to the piling barge was sustained as a result of the perils of the seas. The defendant, in was submitted, had failed to bring any witnesses to disprove this.

[27] The defendant's learned counsel in his submission denied that the plaintiff is entitled to the rectification that it has sought for. It was submitted that CN 541 ('P9') was correctly issued based on the representation of the plaintiff or it's representative, Showa Leasing Sdn Bhd. The defendant said that it issued CN 542 ('P20') to cover the vessel which is the subject matter of this suit. P9 was cancelled and replaced by P20. The defendant, it was submitted, was entitled to repudiate liability under their policy as the plaintiff was in breach of the warranty in P20 requiring the relevant survey to be done by an LSA staff surveyor.

[28] The defendant contended that the damage to the vessel was not caused by the perils of the sea.

[29] The defendant's learned counsel submitted that in order to obtain declaration from this court that rectification of P9 be allowed, the plaintiff must satisfy this court that there has been 'fraud' or 'mutual mistake' of the parties concerned. Sections 30 and 31 of the Specific Relief Act 1950 were referred to.

Learned counsel also referred to the cases of *Pang Lim v China Insurance Co Ltd* [1975] 1 MLJ 239 and *Mat Roni bin Daud v Siti bte Hussin & Ors* [2000] 5 MLJ 605.

[30] The defendant's learned counsel said that since in this case there is no fraud, the onus is on the plaintiff to establish that there has been a mutual mistake, which is common to both parties. According to learned counsel the mistake of one party to a contract is not a good ground for rectification. On this point, learned counsel referred to the cases of *Southwind Development Sdn Bhd v Hass Plantation Sdn Bhd* [1996] 5 MLJ 85 and *Rivertake Properties Ltd v Paul* [1974] 2 All ER 656.

[31] The defendant's learned counsel submitted that the plaintiff has not shown or proved that there has been a mutual mistake common to both parties, based on a number of grounds. The first ground is that the plaintiff has not proved that the particulars of the barge were brought to the defendant's attention before P9 was issued. PW2 has not established that P8 was handed to the defendants prior to P9 being issued. On the other hand, DW1 denied that he received P8 prior P9 being issued. The only documents that he received were the ones handed to him by Showa Leasing.

[32] It was pointed out that the plaintiff did not complain of the receipt or contents of P20 or of the subsequent Policy of Insurance ('D47') until almost a year after the policy was issued. As for DW1, he never admitted making a mistake as to the details of the vessel to be insured. The defendant was always under the impression that the particulars of the vessel were those stated in P9.

[33] It was submitted that any mistake was unilateral, on the part of the plaintiff or Showa Leasing. The plaintiff, according to the defendant's learned counsel, had breached the provisions of P20. The plaintiff has not appointed an ISA surveyor. As for the claim proper, the defendant contended that the piling boom or vessel fell into the sea. There is no collision. Therefore the claim is not covered under P20.

[34] In reply to the defendant's submission, learned counsel for the plaintiff submitted that the plaintiff is entitled to rectification and the two declaratory orders it has sought for. It has called all the relevant witnesses, including an expert who gave evidence on perils of the sea. Conversely, the defendant only called one witness and a weak one at that. It has however, failed to call all the vital witnesses, including the underwriters/reinsurers, Ms Yap and the personnel involved. As a result, the defendant has failed to discharge its evidential burden.

[35] Upon going through all the evidence before me and the submissions of learned counsels on both sides, I find that the plaintiff has proven its case on the balance of probabilities. It has called all the material witnesses. PW1, the representative in Showa Leasing, PW2, the principal contact person there and PW3, the master mariner who gave evidence on perils of the sea. He convinced me that at the material time, the piling boom did not just fall off

its bracket and damaged the barge, in calm seas, just like that. I accept PW3's evidence that the wind force of 6 on the Beaufort scale means that the wind is strong and coupled with rough seas and bad weather. This means that the damage suffered by the piling barge was a result of perils of the sea.

[36] As for which cover note was in force, I find that it is crystal clear from the evidence that the plaintiff never intended for a new cover note to be issued. When it faxed the letter to the defendant on 2 November 1995, it wanted the defendant to rectify the errors regarding the details of the piling barge in CN 541. However, the defendant issued a new cover note in the form of CN 542 instead unilaterally. The plaintiff never requested for issuance of a new cover note.

[37] From the evidence of witnesses, I find that it is crystal clear that CN 541 is the cover note that was in force at the material time. Premium was paid for it. No premium was paid for CN 542. Nevertheless the defendant issued CN 542. It was evident that that the defendant has not issued any prior notice on this change. Notice is crucial since CN 542 contains the clause that survey must be done by LAS Surveyors. This, coupled with the absence of underwriters or reinsurers on the part of the defendant to give evidence on this, reinforces by belief that the defendant is seeking to merely escape liability.

[38] There was no confusion about what the plaintiff was seeking to insure. From the evidence, the plaintiff had only bought one piling barge, 'Bagusia PB 2'. There were no other vessels or boats that could confuse, as DW1 seemed to suggest in his evidence. The evidence reflect the conduct of the parties prior to the issuance of CN 541 was consistent with the fact that the defendant was to insure one piling barge, the one that the plaintiff bought form Japan, which was financed by Showa Leasing (M) Sdn Bhd.

[39] The fact that the defendant is completely denying that there was any mutual mistakes could only mean that the 'vessel' described in CN 541 does in fact exist. I find from the evidence that both parties had concluded a contract for insurance in CN 541. Both parties had the same common intention, which is to insure the piling barge purchased by the plaintiff, Bagusia PB 2. The rectification sought for by plaintiff is minor. It only involves the amendment of particulars and description of the piling barge in CN 541. I would allow this rectification.

[40] I agree with the learned counsel for the plaintiff that the cases submitted by the defendant do not apply. In *Pang Lim v China Insurance Co Ltd* [1975] 1 MLJ 239 and *Mat Roni bin Daud v Siti bte Hussin & Ors* [2000] 5 MLJ 605, the learned judges dismissed the respective plaintiff's claims for rectification on the basis the evidence led did not support such a claim. In our case, the plaintiff has proven on a balance of probabilities that there is a common intention of the parties that that particulars of the piling barge in CN 541 were to be rectified. It was never intended that more than one vessel is to be insured.

[41] The defendant has failed to discharge its onus of proof concerning its defence of the plaintiff's claim for declarations and rectification. No evidence was led by the defendant to substantiate its allegation that the plaintiff is not entitled to the reliefs sought for in the statement of claim.

[42] I am satisfied that the plaintiff has demonstrated and proven on a balance of probabilities that the damage to the piling barge was a result of perils of the sea. The decision in *The 'Benoi VT'* [1987] 2 MLJ 123 supported the plaintiff's case.

[43] Having considered the facts as adduced in the evidence of witnesses and the law, I allowed declarations (a) and (b) that the applicable cover note for the vessel is CN 541 which contained errors and does not reflect the terms that were agreed by the parties. I also allowed the rectification of CN 541 to correct its date of issuance and coverage from 31 October 1994 to 31 October 1995 and those particulars as pleaded in para 7 of the amended statement of claim. As I am satisfied that the damage was due to peril of the sea I allowed the plaintiff's claim with costs to be taxed and a date for hearing on the quantum.

Plaintiff's claim allowed.

Reported by Loo Lai Mee